Office - Supreme Court, U.S.
FILED
DEC 19 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-825

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NORTHWEST AIRLINES, INC.,
Petitioner,

v.

MARY P. LAFFEY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF IN OPPOSITION

MICHAEL H. GOTTESMAN
(Counsel of Record)
ROBERT M. WEINBERG
JULIA PENNY CLARK
BREDHOFF & KAISER
1000 Connecticut Ave., N.W.
Washington, D.C. 20036
Attorneys for Respondents

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
COUNTER-STATEMENT OF THE CASE	1
1. Sex segregation in the dual salary scale	2
2. Equality of work	4
3. NWA's motive for paying stewardesses less than pursers	7
ARGUMENT	8
Issue I	8
Issue II	19
Issue III	23
Issue IV	27
CONCLUSION	30

TABLE OF AUTHORITIES

Cases	Page
Addison v. Huron Stevedoring Corp., 204 F.2d 88 (2d Cir.), *cert. denied*, 346 U.S. 877 (1953)	29, 30
Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975)	23
Battaglia v. General Motors Corp., 169 F.2d 254 (2nd Cir. 1948)	30
Beebe v. United States, 640 F.2d 1283 (Ct. Cl. 1981)	28
Brennan v. Heard, 491 F.2d 1 (5th Cir. 1974)	23
Brennan v. Valley Towing Co., Inc., 515 F.2d 100 (9th Cir. 1975)	10
Brennan v. Westinghouse Credit Corp., 21 Wage & Hour Cas. 871 (E.D. Tenn. 1973)	24
Burnley v. Short, 730 F.2d 136 (4th Cir. 1984)	28
Castillo v. Givens, 704 F.2d 181 (5th Cir.), *cert. denied*, —— U.S. ——, 104 S.Ct. 160 (1983)	25
Coleman v. Jiffy June Farms, Inc., 458 F.2d 1139 (5th Cir. 1971), *cert. denied*, 409 U.S. 948 (1972)	23-24
Conklin v. Joseph C. Hofgesang Sand Co., 565 F.2d 405 (6th Cir. 1977)	10
Corning Glass Works v. Brennan, 417 U.S. 188 (1974)	9
County of Washington v. Gunther, 452 U.S. 161 (1981)	9-10, 15-18
Donovan v. Carls Drug Co., 703 F.2d 650 (2nd Cir. 1983)	24, 25
Donovan v. Hamm's Drive Inn, 661 F.2d 316 (5th Cir. 1981)	10
Donovan v. Simmons Petroleum Co., 725 F.2d 83 (10th Cir. 1983	24, 25
E.E.O.C. v. Central Kansas Medical Center, 705 F.2d 1270 (10th Cir. 1983)	6
E.E.O.C. v. Mercy Hosp. and Medical Center, 709 F.2d 1195 (7th Cir. 1983)	6
Goodrich v. Intern. Broth. of Elec. Workers, AFL-CIO, 712 F.2d 1488 (D.C. Cir. 1983)	10
Gunther v. County of Washington, 623 F.2d 1303 (9th Cir. 1980), *affirmed*, 452 U.S. 61 (1981)	6

TABLE OF AUTHORITIES—Continued

	Page
Katz v. School District of Clayton, Missouri, 557 F.2d 153 (8th Cir. 1977)	6
Lorillard v. Pons, 434 U.S. 575 (1978)	27
Los Angeles Dept. of Power & Light v. Manhart, 435 U.S. 702 (1978)	23
Maguire v. Trans World Airlines, Inc., 535 F.Supp. 1283 (S.D.N.Y.), *aff'd in part, rev. and rem. in part*, 722 F.2d 728 (2d Cir. 1983)	8
Marshall v. Brunner, 668 F.2d 748 (3rd Cir. 1982)	28
Marshall v. Erin Food Services, Inc., 672 F.2d 229 (1st Cir. 1982)	24, 25
Marshall v. Root's Restaurant, Inc., 667 F.2d 559 (6th Cir.), *cert. denied*, 459 U.S. 825 (1982)	24, 25
Marshall v. Union Pacific Motor Freight Co., 650 F.2d 1085 (9th Cir. 1981)	24, 25
Maxwell v. City of Tucson, 35 FEP Cases 359 (9th Cir. 1984)	18-19
McClanahan v. Matthews, 440 F.2d 320 (6th Cir. 1971)	28
Mitchell v. Williams, 420 F.2d 67 (8th Cir. 1969)	10
Plemer v. Parsons-Gilbane, 713 F.2d 1127 (5th Cir. 1983)	19
Rothman v. Publicker Indus. Inc., 201 F.2d 618 (3rd Cir. 1953)	28
Sinclair v. Automobile Club of Oklahoma, Inc., 733 F.2d 726 (10th Cir. 1984)	28
Spies v. United States, 317 U.S. 492 (1943)	25
Steiner v. Mitchell, 350 U.S. 247 (1956)	30
Strecker v. Grand Forks Cty. Soc. Serv. Bd., 640 F.2d 96 (8th Cir. 1980)	6
Trans World Airlines, Inc. v. Thurston, No. 83-997	25-27
Wirtz v. F. M. Sloan, Inc., 411 F.2d 56 (3rd Cir. 1969), affirming, 285 F.Supp. 669 (W.D. Pa. 1968)	10
Wright v. Carrigg, 275 F.2d 448 (4th Cir. 1960)	28

TABLE OF AUTHORITIES—Continued

Statutes and Rules	Page
Age Discrimination in Employment Act, § 7(b), 29 U.S.C. § 626(b)	25-27
Civil Rights Act of 1964, Title VII, 42 U.S.C. §§ 2000e et seq.	8-23
Equal Pay Act of 1963:	
29 U.S.C. § 206(d)(1)	8-19, 22, 23
29 U.S.C. § 206(d)(2)	17
Sec. 4 (not codified), P.L. 88-38, 77 Stat. 57 (1963)	17
Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq.	10
29 U.S.C. § 251	30
29 U.S.C. § 252	30
29 U.S.C. § 255(a)	23-27
29 U.S.C. § 260	27-30
Federal Rules of Civil Procedure:	
Rule 8(c)	10
Rule 12(h)	10
Legislative Materials	
H. Rep. No. 71, 80th Cong., 1st Sess. (1947)	30
H. Rep. No. 309, 88th Cong., 1st Sess. (1963)	16-17
109 Cong. Rec. (1963)	17

BRIEF IN OPPOSITION

Respondents submit that this case does not warrant review by this Court.

COUNTER-STATEMENT OF THE CASE

In its zeal to make this case appear worthy of this Court's time and attention, petitioner (hereinafter NWA) has found it necessary to put to this Court the case, not as it actually exists, but as NWA wishes it existed. The facts of this case are as set forth in the district court's extensive findings, issued in 1973 after the court had heard five weeks of testimony and had reviewed thousands of pages of exhibits; those findings take up about 55 pages of the appendix to NWA's petition (App. 161a-216a). At NWA's request, many of those findings were reviewed by the court of appeals in 1976; that court unanimously affirmed, in a careful opinion (*Laffey I*) covering 96 pages of the appendix (App. 65a-160a). (NWA sought certiorari from that opinion, which was denied in 1978 (434 U.S. 1086)). Those findings were reaffirmed in *Laffey III*, when NWA sought to challenge them again (App. 1a-63a).[1] Yet virtually every line of the "statement" in NWA's current petition is inconsistent with the facts as found below.

---

[1] NWA notes in its statement that the award affirmed in *Laffey III* "totals approximately $60 million" (Pet. 2). A significant portion of that is attributable to findings of sex discrimination that NWA does not challenge in this Court: furnishing men single rooms on layovers while requiring women to share double rooms; suspending and firing women for becoming five pounds overweight, while allowing men to continue their employment even when substantially overweight; and paying for the cleaning of men's but not women's uniforms (App. 3a; see also App. 183a-185a). Additionally, the size of the backpay award is in major part a reflection of the duration of NWA's discriminatory practices (the backpay period encompassed more than eleven years, NWA not ceasing some of its discriminatory practices until eight years after suit was filed), and of NWA's success in attenuating this lawsuit (a substantial portion of the award consists of compensation for delay in receiving backpay, some of which is owing for violations committed more than 17 years ago).

In this counter-statement, we address three aspects of NWA's mischaracterization of the record: its attempt to mask the sex-segregation in its dual salary scale; its attempt to portray the work of pursers and stewardesses as different in fact; and its pretense that it paid the men and women differently for 30 years because of an innocent mistake. (We discuss other inaccuracies in NWA's statement in the pertinent sections of our argument).

1. *Sex segregation in the dual salary scale.* NWA paid salaries to its "pursers" that were 20% to 55% higher than those NWA paid to its "stewardesses" (App. 215a). NWA's Petition states that "most" pursers were men, but that the lower-paid classification (to which the women were relegated) also included "a significant number of men"—indeed, "hundreds" (Pet. 3). This supposed fact furnishes the predicate for NWA's repeated contention that it could not have been motivated by sex in maintaining the dual salary scale. But NWA's recitation is directly contrary to the findings of the district court:

> As of April 25, 1970 [four days before the EEOC charge that triggered this litigation was filed], the Company employed 137 male cabin attendants, all as pursers, and 1,747 female cabin attendants, all but one classified as stewardesses.[2]
>
> * * * *
>
> Between May 1, 1965 [two months prior to the effective date of Title VII], and May 1, 1970, the Company hired 118 new male cabin attendants, all of them as pursers. During the same period, it hired 2,224 new female cabin attendants, all of them as stewardesses. [App. 168a-169a].

These figures are hardly surprising, given that NWA's Director of In-Flight Services, who was responsible for the classification of cabin attendants, testified at trial

---

[2] The one female who had become classified as a purser had accomplished that feat only by running an extraordinary gauntlet erected by NWA to defeat her efforts (App. 173a-176a). She was reclassified back to stewardess shortly after this suit was filed (App. 176a-177a).

that NWA "just assumed" that "males would be pursers and females would be stewardesses." (JA 766).[3]

The "hundreds of men" in the lower-paid category to whom NWA refers in its Petition were the product of actions taken by NWA after this suit was instituted, to temper the evident sexual identification in its dual salary scale. As the court below explained:

> These statistics changed significantly *after suit was filed*, when NWA began to diversify male-female ratios in different occupations. Some men were placed in the lower-paid categories by demoting pursers and by hiring new male applicants as "stewards"—who were paid at the stewardess rate. [App. 70a, n.19 (emphasis added), citing the district court's findings at App. 169a, 176a].[4]

NWA also ignores the findings below in suggesting that its restriction of the *higher*-paid classification solely to men ended in "the late 1960's" (Pet. 3, 5-6). While NWA *purported* to open the purser classification to women in 1967 (on less favorable terms then had been previously extended to men, App. 171a-173a), the reality, as found by the district court, was that from that point forward NWA discriminated rampantly against women who sought the purser classification and succeeded in keeping all but one woman from obtaining that classifi-

---

[3] "JA" refers to the Joint Appendix in the court below in *Laffey I*, which was also used in *Laffey III*. We have lodged with the Clerk copies of those volumes of the Joint Appendix below that are cited herein.

[4] NWA had hired some men at an initial salary equal to the stewardess salary between 1949 and 1957—when it used a plane containing a sunken bar lounge and desired men to tend the bar (App. 164a, 168a). These men (called flight service attendants, or FSA's) were promised prompt advancement to purser salaries (App. 167a-168a). As one NWA witness testified: "we do not hire flight service attendants and leave them in limbo without becoming pursers for an indefinite period of time." (J.A. 863). Not one man was hired at the stewardess salary between 1957 (when NWA ceased using the plane with the sunken bar lounge) and the filing of this lawsuit in 1970 (App. 168a).

cation (App. 173a-182a).[5] The district court found that "[t]op Company personnel" participated in this discrimination (App. 181a-182a).

2. *Equality of work.* The description in NWA's Petition of the work done by pursers and stewardesses deviates 180° from the findings below. The district court found that pursers and stewardesses were performing equal work, and that finding was affirmed by the court of appeals. It should be evident that if the work of pursers and stewardesses were as depicted in NWA's Petition—*i.e.*, if pursers were supervisors and stewardesses their subordinates—NWA would be seeking review of the holding that men and women were doing "equal work."

To begin with, although NWA's Petition talks throughout about two separate "jobs," the district court found that there was only one job—cabin attendant—whose duties were the same whether performed by men called "pursers" or by women called "stewardesses." The number of cabin attendants assigned to a flight was a constant, regardless of whether the positions were filled by pursers or stewardesses; if a purser was assigned, there was one less stewardess (App. 195a). "Virtually all duties assigned to cabin attendants are performed by all cabin attendants, regardless of classification" (App. 196a). All performed identical functions in carrying out the three basic components of the cabin attendant job: providing service to passengers, insuring passenger safety in the event of emergencies, and promoting the company's good will among passengers (App. 196a-197a).[6] To be sure, there were minor differences in the particular duties a cabin attendant would be called upon to perform—depending, *e.g.*, on the type of plane, the length of

---

[5] The fate of the one woman who became classified as a purser is described at n. 2, *supra*.

[6] We use the past tense, because in 1976, as the district court had ordered, NWA abolished the separate purser and stewardess classifications and merged them into a single "cabin attendant" classification.

the flight, the itinerary, whether a meal was to be served, whether the attendant was working in first class or coach, etc.—so that some cabin attendants were called upon to perform duties that others were not. But those extra duties were borne by both stewardesses and pursers, and did not differentiate the two (App. 197a-207a). NWA's dual salary scale compensated all pursers alike, and all stewardesses alike (at levels substantially below the pursers), regardless of the particular duties they were called upon to perform (App. 215a-216a).

NWA's depiction of supposed differences in "supervisory" responsibilities as between pursers and stewardesses is, to say the least, fanciful. Neither pursers nor stewardesses, who were represented by the same union in a single bargaining unit, had any of the duties customarily associated with supervision. They had no authority to suspend, discipline, or even warn other cabin attendants (JA 523, 526, 1073). They had no responsibility to recommend such action to their superiors (JA 526). It was the responsibility of every cabin attendant on every flight—purser and stewardess alike—to report acts of misconduct by other cabin attendants to their superiors (JA 523-524). Not once did NWA's 500-page Cabin Service Manual (JA 1559-1728), which described the cabin attendants' duties in great detail, refer to the purser or stewardess as "supervisor," and not once did it describe any of their duties as "supervisory." [7]

While the assigned duties of all cabin attendants were the same, NWA wanted the more experienced cabin attendants on the flight to help out new cabin attendants if they encountered any difficulties. To this end, NWA assigned two cabin attendants on each flight—one in the

---

[7] NWA had *another* category of employees, called "inflight supervisors," who *did* perform supervisory duties: they evaluated and disciplined pursers and stewardesses, and conducted periodic "check rides" to monitor their performance. In-flight supervisors, unlike pursers and stewardesses, were not in the bargaining unit. There was, of course, no claim in this case that the duties of in-flight supervisors constituted equal work with stewardesses.

first class section (the "senior cabin attendant") and one in the tourist section (the "senior in tourist")—the function of "[m]onitoring and where necessary correcting work of other cabin attendants" (App. 209a-210a). It is this "monitoring" function that NWA has chosen in this litigation (albeit never before) to label "supervisory." But the vast majority of senior cabin attendants and senior in tourist positions were occupied by stewardesses, not pursers; and the monitoring function was the same whether the position was occupied by a purser or stewardess, as six male pursers testified, as NWA's own officials conceded in their testimony, and as the district court found (App. 208a-209a).[8]

Indeed,the district court found that in practice stewardesses serving as "senior in tourist" and "senior cabin attendant" were called upon far more often than pursers to assist and correct inexperienced cabin attendants, because "[n]ormally, all of the stewardesses on flights on which pursers are assigned are relatively senior and experienced" (App. 210a; see also, App. 98a-99a). Significantly, NWA's own contemporaneous descriptions of the duties of pursers and stewardesses never mentioned the

---

[8] NWA points to the definitions of "purser" and "stewardess" in the collective bargaining agreements, and notes that only the "purser" definition referred to this function (Pet. 4). But NWA's Cabin Service Manual assigned the monitoring function to both pursers and stewardesses (App. 208a). And, in any event, it is the reality, and not inaccurate job descriptions, that controls the determination of whether men and women are performing "equal work." 29 CFR § 800.121; *E.E.O.C. v. Mercy Hosp. and Medical Center*, 709 F.2d 1195, 1197 (7th Cir. 1983); *E.E.O.C. v. Central Kansas Medical Center*, 705 F.2d 1270, 1273 (10th Cir. 1983); *Strecker v. Grand Forks Cty. Soc. Serv. Bd.*, 640 F.2d 96, 100 (8th Cir. 1980); *Gunther v. County of Washington*, 623 F.2d 1303, 1309 (9th Cir. 1980), *affirmed*, 452 U.S. 161 (1981); *Katz v. School District of Clayton, Missouri*, 557 F.2d 153, 156 (8th Cir. 1977), and cases cited therein. NWA notes that its Manual contained slightly different language in describing the pursers' and stewardesses' "accountability" as senior cabin attendants (Pet. 5), but the district court found that in fact there was no difference in accountability (App. 209a-211a).

monitoring function as a factor that distinguished pursers from stewardesses.[9]

NWA never regarded the performance of the monitoring function as relevant in determining the pay levels of either pursers or stewardesses. Pursers who consistently flew *not* as senior cabin attendant (and thus without the monitoring function) were paid the same as pursers flying constantly in that capacity, while stewardesses who regularly flew as senior cabin attendant were paid the same as those who did not (App. 98a). An expert in industrial engineering who had observed the work performed in flight and intensively studied NWA's Cabin Service Manual, disciplinary records, and pay practices, testified that the monitoring function was "insignificant" in content and had been treated as irrelevant by NWA in determining cabin attendants' pay levels (JA 618-621, 648-650, 2245). And the courts below so found (App. 102a-103a, 211a (insignificant); App. 98a, 215a-216a (treated by NWA as irrelevant for pay purposes)).

3. *NWA's motive for paying stewardesses less than pursers.* Because the precise findings of the courts below respecting NWA's motive are central to demonstrating why the first question posed in NWA's Petition is not presented here, we defer to our Argument the correction of NWA's inaccurate statements at Pet. 6-7. We note only that, as more fully established *infra* at 11-13, (1) neither the district court nor the court of appeals found or even suggested that NWA's *reason* for paying stewardesses less than pursers was a mistaken belief that they were performing different work; and (2) on the contrary, both courts expressly found that NWA was *not* motivated by perceived differences in the work of pursers and stewardesses, and that sex was in fact the motive for the dual salary scale.[10]

---

[9] *E.g.*, P. Ex. 279; P. Ex. 90, p. 242; P. Ex. 91; P. Ex. 93; D. Ex. 1, App. C-5; Trial Tr. 2675-76, 2735-36.

[10] We note here certain other inaccuracies in NWA's statement of the case:

ARGUMENT

As we explain below, none of the questions in NWA's Petition warrants review by this Court.

I.

NWA does not in this Court challenge the findings of the courts below that NWA paid males more than females for performing equal work. The issue posed by NWA is whether, nevertheless, NWA should have been found to have established a *defense* to an equal pay violation: that the salary "differential [was] based on any other factor other than sex" (29 U.S.C. § 206(d)(1)(iv))—a defense which, as NWA correctly points out (Pet. 9-10), is applicable under both the Equal Pay Act and Title VII. The "factor other than sex" which NWA invokes is NWA's purported mistake in believing that there were material differences between the work of pursers and stewardesses when in fact there were not. In simple terms, NWA is asking this Court to determine whether such a mistake of fact is a "factor other than sex" and therefore a defense to an equal pay violation.

NWA's repeated suggestion that the dual salary scale was established in collective bargaining (Pet. 3, 4, 6) is false. The salary differential was created unilaterally by NWA (App. 88a). The union inherited an NWA-created *"status quo* under which pursers were more highly paid than stewardesses" (*id.*), and when the union "attempt[ed] to win better treatment for stewardesses, it encountered stiff resistance from NWA" (App. 89a). The union's failure to achieve pay equity was "not attributable to any belief" that the work of pursers and stewardesses was different (*id.*).

NWA asserts that in creating the purser classification in 1947 and treating it as different from the stewardess classification, it merely "followed the lead" of Pan Am and TWA (Pet. 4). But there is nothing in the record of this case that supports NWA's contention that it created positions whose content resembled those bearing the same titles on Pan Am or TWA, and the case NWA cites, *Maguire v. Trans World Airlines, Inc.*, 535 F.Supp. 1283 (S.D.N.Y.), *aff'd in part, rev'd and rem'd in part*, 722 F.2d 728 (2d Cir. 1983), suggests the opposite: *Maguire* states that TWA created the same dissimilar purser and stewardess positions as existed on Pam Am, 535 F. Supp. at 1288, but that the situation at NWA was "entirely different" from Pan Am and TWA in that the work of pursers and stewardesses was the same, *id.* at 1299.

In the context of this case, the question is not worthy of this Court's consideration for each of the following reasons: (1) The "factor other than sex" defense is an affirmative defense which must be properly pleaded and proved by the defendant; in this case NWA never asserted its "mistake" defense in the trial court, and indeed asserted that defense for the first time only on its third appeal in the court below—ten years after the violation had been found by the district court, and seven years after that finding had been affirmed by the court of appeals. The defense thus was waived. (2) No court has found that NWA based the wage differential at issue here on a mistaken belief that the work of pursers and stewardesses was different; indeed, the findings of the trial court, affirmed by the court of appeals, are directly to the contrary. (3) The proposed question presented does not accord with the record in another respect. In the words of the court below, "[w]here, as here, there is an actual intent to separate jobs by sex, and the employer is found in fact to have paid women less for equal work, . . . disparate treatment is solidly established" (App. 14a). (4) Even if the issue were properly presented here, it is clear that Congress did not intend a mistake of fact to be a defense to an equal pay violation, and nothing in *County of Washington v. Gunther*, 452 U.S. 161 (1981) is to the contrary. (5) There is no conflict in the circuits on the issue posed by NWA, and the issue is not one of sufficient recurrence or importance to merit this Court's plenary consideration. We briefly elaborate on these points below.

1. In *Corning Glass Works v. Brennan*, 417 U.S. 188, 196 (1974), the Court held that in an equal pay case "once the [plaintiff] has carried [the] burden of showing that the employer pays workers of one sex more than workers of the opposite sex for equal work, the burden shifts to the employer to show that the differential is justified under one of the Act's four exceptions." The "factor other than sex" exception is the fourth of the four exceptions referred to in *Corning*. In *Gunther* this Court reiterated that this exception is an "affirmative defense."

452 U.S. at 170. The Federal Rules of Civil Procedure require a defendant to plead, or else waive, an affirmative defense. Rules 8(c), 12(h). And the lower courts have consistently applied this pleading requirement to the affirmative defenses under the Equal Pay Act and, more generally, under the Fair Labor Standards Act.[11] NWA never pleaded the affirmative defense that it now asserts. Indeed, at no time before its third appeal to the court of appeals on the merits of this case—many years after the equal pay violation had been found and affirmed—did NWA contend that its purported mistaken belief that the work of pursers and stewardesses was different constituted a defense under the "factor other than sex" exception.

When NWA for the first time in the case raised this defense in the court of appeals in *Laffey III*, plaintiffs argued that NWA had for the reasons just stated waived its right to raise the issue. The court of appeals held that NWA's newly-injected defense was without legal merit, and did not address the threshold question of waiver.[12]

---

[11] See, e.g., *Goodrich v. Intern. Broth. of Elec. Workers, AFL-CIO*, 712 F.2d 1488, 1491 (D.C. Cir. 1983); *Donovan v. Hamm's Drive Inn*, 661 F.2d 316, 317-18 (5th Cir. 1981); *Conklin v. Joseph C. Hofgesang Sand Co.*, 565 F.2d 405, 406-7 (6th Cir. 1977); *Brennan v. Valley Towing Co., Inc.*, 515 F.2d 100, 104 (9th Cir. 1975); *Mitchell v. Williams*, 420 F.2d 67, 68 n.2 (8th Cir. 1969), and cases cited therein; *Wirtz v. F.H. Sloan, Inc.*, 411 F.2d 56, 60 (3rd Cir. 1969), affirming, 285 F.Supp. 669, 675 (W.D. Pa. 1968).

[12] The court had followed a similar course in *Laffey I*. There, NWA attempted to belatedly inject a different "factor other than sex" defense ("foreign flying") than the one proffered in *Laffey III*. As in *Laffey III*, plaintiffs argued that NWA had waived the defense by not raising it in timely fashion. As in *Laffey III*, the court of appeals rejected the defense on the merits, without deciding the question of waiver (App. 101a-102a n.153):

> The counter-argument advanced is that the exception to the Act is an affirmative defense which NWA has waived because it was never pleaded. We need not resolve this issue, however, since even if NWA properly raised the defense, it has not shouldered its burden of proving it.

That threshold question remains, however, and is, we submit, a bar to NWA's assertion of the issue it seeks to present to this Court.

2. Precisely because NWA did not raise the defense in the trial court, neither the findings of fact nor the conclusions of law that determined NWA's liability make reference to such a defense or to the factual issues that would be pertinent thereto. Most assuredly, the trial court did *not* find, as NWA's question presented assumes, that the wage differential between pursers and stewardesses was *based on* NWA's mistaken belief that their work was different. Indeed, that court made findings of fact directly to the contrary, in the course of resolving the issues that *were* raised.

NWA's lone defense at trial was to dispute that the work of pursers and stewardesses was in fact equal. To this end, NWA asserted a number of respects in which it claimed the work was different. The district court examined each of these asserted differences and found with respect to each that: (a) in fact there was no difference between pursers and stewardesses as such, but rather some pursers and some stewardesses had certain extra duties to perform which others in each category did not (App. 197a-215a); and (b) NWA's pay practices belied the claim that these extra duties had motivated the pay disparity, for NWA did not pay pursers who performed the "extra duties" any more than pursers who did not, nor did NWA pay stewardesses who performed the "extra duties" any more than stewardesses who did not, and indeed NWA paid pursers who did *not* perform these extra duties substantially more than stewardesses who *did* perform them (App. 215a-216a). These findings established that the work differences in which NWA claims to have mistakenly believed did not motivate the pay differential. And, based on these subsidiary findings, the district court concluded that NWA "has discriminated *on the basis of sex* . . . by [p]aying female stewardesses lower salaries and pensions than male pursers." (App. 216a; emphasis added.)

The court of appeals in *Laffey I* expressly affirmed the finding that NWA had been motivated by sex in paying stewardesses less than pursers, and not by purported differences in their work. Thus, the court stated (App. 95a-97a; footnotes omitted):

> An employer must show a consistent pattern of performance of additional duties in order to demonstrate that added duties are genuinely the motivating factor for the substantially higher pay. . . .
>
> . . . Where, for example, all male employees receive greater pay but only some perform the extra tasks allegedly justifying that pay, a reasonable inference is that maleness—not the added chores—is the basis for the higher wage . . . Moreover, if some women without added compensation render the same extra performance that purportedly justified the pay differential favoring men, the inference becomes even stronger that the duties are irrelevant to the wage-setting . . . . The conclusion to be drawn, when any of these inconsistent patterns exist, is that
>
> > [d]espite claims to the contrary, the extra tasks were found to be makeweights. This left sex—which in this context refers to the availability of women at lower wages than men—as the one discernible reason for the wage differential. That, however, is precisely the criterion for setting wages that the Act prohibits.

In light of these principles, the court of appeals examined the numerous district court findings respecting inconsistencies between NWA's proffered explanation for the wage differential and the reality (App. 97a-99a). The court concluded that NWA would have paid cabin attendants differently than it did "if in fact the activities purportedly justifying the larger salary were really the reason for the added compensation" (App. 100a). The court stated (App. 100a; footnote omitted):

> We have pointed to the inconsistencies between occupational tasks and rewards to underscore our conviction that the District Court properly concluded that any greater duties demanded of pursers is not the foundation for their higher pay.

And, the court of appeals concluded from its review of the district court's findings that (Pet. App. 99a; footnote omitted):

> This evidence leads convincingly to the conclusion that the contrast in pay is a consequence of the historical willingness of women to accept inferior financial rewards for equivalent work—precisely the outmoded practice which the Equal Pay Act sought to eradicate.

Ignoring the basic findings in the case, NWA rests its assertion that the wage differential was found to be based on a mistaken belief that the work was different on a statement by the district court addressed to a wholly different question and lifted out of context by NWA (Pet. 6-7, 14). Five months after the district court issued its ruling that NWA had committed an equal pay violation, the court addressed the separate question whether NWA was entitled to be relieved of the obligation to pay liquidated damages. The issue then before the court was not whether the salary differential was "based on" NWA's mistaken belief in work differences (the question NWA *now* poses), but rather whether NWA's belief in the existence of such differences meant that it had reasonable grounds for a good faith belief that in not equalizing the salaries it would not violate the Equal Pay Act (see *infra* at 27-30). In the passage seized upon by NWA, the district court answered that question as follows (App. 220a-221a):

> The Defendant did have reasonable grounds for belief that it was not violating the Equal Pay Act. While this Court has found as fact that the jobs of purser and stewardess are in fact equal, it was not unreasonable for the Company to have believed otherwise. . . . The Court does not find an intentional, bad faith, attempt to evade the law. The judgment of the Company that its conduct would not be found to be in violation of the Equal Pay Act has been found to be in error.

This passage is of no benefit to NWA on the issue it *now* tenders. For a company may be motivated by sex in paying women less than men, and yet believe reasonably and in good faith that continuance of that differential will not contravene an Act that is applicable only if the jobs meet a statutory definition of "equal work." The quoted passage addressed only the latter point. There is no suggestion in the passage that, contrary to all the findings discussed above, the 20% to 55% salary differential was *based on* a mistaken belief that the work was different. And when later advised that NWA was attempting to construe the passage as establishing that proposition as well, the district court expressly rejected any such construction of its opinion:

> MR. GOTTESMAN: I just want to respond to something that recurs, and it's the company's consistent efforts to take this Court's statement that they didn't deliberately intend to violate the Equal Pay Act and try to convert that into a statement by this Court that sex had nothing to do with this pay scale.
>
> THE COURT: Sex had everything to do with this pay scale.[13]

Moreover, the above liquidated damages ruling of the district court—the sole basis for NWA's claim that it was found to have been innocently motivated—was reversed in *Laffey I*. On remand, the evidentiary record on the liquidated damages issue was reopened, and the district court, on a much fuller record, reached a different conclusion than it had the first time: "Defendant has thus failed to satisfy its burden of showing good faith and reasonable grounds for believing that it was in compliance with the Equal Pay Act by paying stewardesses less than pursers" (App. 255a-256a). Among the factors on which this conclusion was based was a finding that the Company officials who thought that NWA's pay practices were in

---

[13] Transcript of hearing on liquidated damages following remand (appearing in the court of appeals record as Record Document 69), at p. 106. We have lodged a copy of this transcript with the Clerk.

compliance with the Equal Pay Act knew little about the actual duties of the pursers and stewardesses and had made no effort to consult those in management who *were* knowledgeable about those duties (App. 49a-50a n.40; 253a).

The passage cited by NWA thus in no way undercuts the clear determination of both courts below (pp. 11-13, *supra*) that the salary differential was "based on" sex, not on any perceived differences in the work of pursers and stewardesses.

3. Even assuming that, contrary to the findings below, the 20% to 55% salary differential between pursers and stewardesses was based on perceived, albeit non-existent, differences in their work, still NWA would be unable to show that the differential was not based on sex. The opinion in *Laffey III* makes this point succinctly (App. 13a-14a; footnotes omitted):

> Even if we could find in *Gunther* the between-the-lines dictum NWA ascribes to the Court, NWA's argument for exoneration from equal pay liability would not suceed.
>
> The Title VII decisions NWA cites unexceptionally involve situations in which the employer did not classify jobs overtly by sex (or race). E.g., *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). In that setting, where sex-based categorization, if it exists, is covert, the Court has elaborated rules for establishing discriminatory intent or the lack thereof. This case, however, involves overt sex classification—explicitly disparate treatment. Purser jobs were reserved for men only, the stewardess class was all-female. NWA has cited no case, nor do we know any, suggesting that a Title VII or Equal Pay Act plaintiff must demonstrate, beyond sex-segregated job classifications and unequal pay for equal work, the employer's evil mind, in NWA's words, "disparate treatment" that proceeds from "discriminatory animus" or a "bad-faith attempt to evade the law." NWA Brief at 14, 39.

> In sum, so far as we can tell, neither Congress nor the [Supreme] Court has ever entertained the notion that an employer who intentionally classifies jobs by sex, and in fact pays women less for the same work, can achieve exoneration by showing he sincerely thought the jobs he separated by sex were different. . . . Where, as here, there is an actual intent to separate jobs by sex, and the employer is found in fact to have paid women less for equal work, all precedent in point indicates that disparate treatment is solidly established.[14]

4. Even if NWA's first issue were properly presented here, it is clear that Congress did not intend the "factor other than sex" exception to make mistake of fact a defense to an equal pay violation.

The first three affirmative defenses under the Equal Pay Act refer to specific objective factors, aside from the duties of a job, which may legitimately justify wage differentials: "(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; . . ." 29 U.S.C. § 206(d)(1). Congress recognized that there were other factors similar in nature, but too numerous to identify, which could similarly justify wage differentials. The fourth affirmative defense—the "factor other than sex" defense—was meant to encompass these other factors. Thus, the House Report explained the "factor other than sex" defense as follows:

---

[14] In a footnote to this passage, the court stated that in a case involving "explicitly sex-based classification" it is not necessary—in the court's words "not even relevant"—for a plaintiff to prove "[a]n employer's 'discriminatory motive' or 'desire to pay men—because they are men—more than [women received].'" (App. 14a-15a, n.12). The purport of that footnote is clear: where discrimination on the basis of sex is overt, there is no need for a plaintiff to prove that the employer's objective was adversely to affect women. That proposition is not in doubt, as the cases cited in the court's footnote establish. Nevertheless, NWA lifts the words "discriminatory motive" and "not even relevant" out of context and misleadingly includes them in its statement of questions presented.

> As it is impossible to list each and every exception, the broad general exclusion has . . . been included. Thus, among other things, shift differentials, restrictions on or differences based on time of day worked, hours of work, lifting or moving heavy objects, differences based on experience, training or ability would also be excluded . . . . [H.R. Rep. No. 309, 88th Cong. 1st Sess. 3, (1963). Accord: 109 Cong. Rec. 9206, 9208 (Rep. Goodell); *Id.* at 9196 (Rep. Thompson).]

What all the factors mentioned by Congress—those in the first three defenses and those referred to in connection with the fourth—have in common is that they provide a sound, objective, non-discriminatory basis for paying one job more than another. Congress did not mean to tie employers' hands as to the choice of which such factors to use.[15] But a mistake of fact by an employer as to the duties of its own employees does not share these

---

[15] As this Court noted in *Gunther*, Congress, in enacting the "factor other than sex" defense, was particularly concerned about not disrupting *bona fide* job-evaluation systems. 452 U.S. at 170-171, n.11. Such systems may incorporate a wide variety of objective factors, other than sex, into the determination of how jobs should be paid. The fourth defense thus would protect use of these systems as long as each of the factors in a given system qualifies as a "factor other than sex." NWA mistakes the scope of protection afforded by the fourth defense when it asserts that "a differential resulting from a unilateral job evaluation system is automatically permissible under the Act" (Pet. 12-13). The objective factors used in a *bona fide* job evaluation system are what the Act protects, not the system *per se*. Similarly, NWA is mistaken in its effort to equate the fact that the wage rates here were agreed to in collective bargaining with a *bona fide* job evaluation system (Pet. 13). As the court of appeals in *Laffey I* stated, there is no evidence in the record that the parties to collective bargaining ever evaluated the work of pursers or stewardesses in the course of negotiating wage rates (App. 88a-89a). See also n.10, *supra*. Moreover, Congress expressly determined that wage differentials resulting from good faith collective bargaining are *not* to be exempt from the Act's prohibitions. (App. 50a & n.41; Section 4 of the Equal Pay Act (not codified), P.L. 88-38, 77 Stat. 57 (1963); see also 29 U.S.C. § 206(d)(2)).

qualities. Congress evinced no desire to protect those employers who make such mistakes from having to pay females the same wages as males for performing equal work.

NWA errs in reading this Court's decision in *Gunther* to say otherwise. NWA quotes, at Pet. 10-11, a portion of a passage from *Gunther*, 452 U.S. at 170-171, but leaves off the next two pertinent sentences:

> Equal Pay Act litigation, therefore, has been structured to permit employers to defend against charges of discrimination where their pay differentials are based on a bona fide use of "other factors other than sex." Under the Equal Pay Act, the courts and administrative agencies are not permitted to "substitute their judgment for the judgment of the employer . . . who [has] established and applied a bona fide job rating system," so long as it does not discriminate on the basis of sex. 109 Cong. Rec. 9209 (1963) (statement of Rep. Goodell, principal exponent of the Act). [Footnote omitted].

Read in full, the point of the *Gunther* passage is simply that Congress meant to protect the pay practices of employers who pay their employees based upon objective factors other than sex, regardless of whether those factors might unintentionally adversely affect the wages of employees of one sex as compared to the wages of employees of the other sex. Nothing in this passage suggests that where there is no such factor, but simply a mistake of fact, the fourth affirmative defense may successfully be invoked. As the *Gunther* Court put it, "The question . . . is what *wage practices* have been *affirmatively authorized* by the Equal Pay Act." 452 U.S. at 169 (emphasis added). The Act did not "affirmatively authorize" employers to pay women less than men for equal work where the difference is based on a mistake of fact.

5. NWA asserts that two decisions in other circuits have decided the issue NWA seeks to raise in a manner conflicting with the resolution below. There is no such

conflict. Neither *Plemer v. Parsons-Gilbane*, 713 F.2d 1127 (5th Cir. 1983), nor *Maxwell v. City of Tucson*, 35 FEP Cases 359 (9th Cir. 1984), even deals with the question whether a mistake of fact is a "factor other than sex." And, neither of those cases adopts any position that would conflict with the view that a mistake of fact is not such a defense. Both cases stand for the proposition that where an employer asserts an *objective* basis other than sex for a wage differential, the question remains whether the employer's proffered "factor other than sex" is a pretext and not the real reason for the wage differential.[16]

There is no indication that the first question presented by NWA is a recurring one. Certainly, it is not a matter of pressing importance in the administration of equal pay law. No reason appears why this Court should give plenary consideration to this question.

II.

The second question that NWA tenders is whether courts, upon finding an equal pay violation under Title VII, are "required" to award backpay in the amount of the difference between what the men and women received. NWA contends that they are not, and that the proper remedy is to award backpay on the basis of a hypothesized finding as to what the employer would have paid both sexes had it not maintained a dual salary scale.

As we discuss *infra* at 23 n.20, NWA's statement of the question inaccurately describes what happened here: the formula for calculating backpay in this case was entered pursuant to the remedial discretion of the district court and was not thought by that court to be

---

[16] NWA's reliance on the concurring opinion of Judge Merrill in *Maxwell* is particularly puzzling. Judge Merill's opinion simply disputes the view of the other two members of the panel that the employer's asserted "factor other than sex"—an objective factor—was a pretext. See 35 FEP Cases at 359, 362, 364. In any event, the minority view of a single judge on a panel is no basis for asserting a conflict in the circuits.

"required" by law. But more importantly, NWA's question is not presented in this case, because, as the court below in *Laffey III* held, NWA waived its right to raise the question by failing to assert it in a timely fashion (App. 33a-34a):

> NWA had the opportunity to appeal any feature of the back-pay award, including the use of the full purser rates, in *Laffey I*. Therefore, NWA must be deemed to have waived any argument available at that time which it did not assert.
>
> Adherence to the rule that a party waives a "contention that could have been but was not raised on [a] prior appeal," *Munoz v. County of Imperial*, 667 F.2d 811, 817 (9th Cir.), *cert. denied*, 459 U.S. 825 (1982), is, of course, necessary to the orderly conduct of litigation.[17]

NWA does not ask this Court to review the waiver holding, and thus the decision below rests upon an independent ground that is not challenged in this Court. In any event, even if NWA *had* sought review of the waiver holding in its Petition, the court below was plainly correct in finding waiver.

Litigation over the remedial formula for curing the equal pay violation took place in early 1974. Plaintiffs proposed backpay in the amount of the difference between purser and stewardess salaries. NWA argued that *no* backpay should be awarded, but did not dispute that

---

[17] Preliminary to so holding, the court below evaluated NWA's claim that there was an intervening change in the law that justified the belated injection of this issue into the case, and concluded that there was no such change: the legal principle that NWA contends is *now* the law—that Title VII victims should not be placed "in a better position than they would have been in if the alleged discrimination had not occurred" (App. 30a)—was already established as the law at the time that NWA was originally called upon to state its position respecting the appropriate backpay formula (App. 31a). The court further observed that even had the principle not been already established at that time, nothing would have foreclosed NWA from advancing the point, and thus subsequent judicial endorsement of the principle upon which NWA now relies would not excuse NWA's failure to have raised it before (App. 33a, n.28).

if backpay was to be awarded it should be in the amount of the difference; indeed, NWA's own back-up position contemplated that backpay would be calculated in that manner.[18] The district court's remedial order, which it converted into a judgment in mid-1974, thus reflected the positions of both sides that if backpay was to be awarded it should be measured by the difference between purser and stewardess salaries.

All challenges to the 1974 judgment were made, and resolved, in *Laffey I* (App. 33a). NWA challenged several features of the remedial order incorporated into the 1974 judgment (App. 113a-155a), but not the provision computing backpay by the difference between purser and stewardess salaries.[19] In the absence of a challenge, that provision was "affirm[ed]" in *Laffey I* (App. 160a).

It was not until 1978, following this Court's denial of certiorari in *Laffey I* and the remand to enable the district court to compute the individual backpay entitlements pursuant to the by-then-affirmed remedial formula, that NWA *for the first time in this litigation* sought a change in the backpay formula on the ground now advanced here. Recognizing that there was no evidentiary foundation in the existing record that could justify the change it was seeking, NWA sought to reopen the record to introduce an affidavit whose purport was that NWA, had it not maintained a dual salary scale, would have instead maintained a single scale below the level actually paid to men. This belatedly tendered affidavit is the "evidence"

---

[18] NWA contended that the measurement of that difference be done differently than plaintiffs proposed in one minor respect—a contention that was resolved against NWA (App. 101a-102a, n.153) —but NWA accepted the underlying proposition that the difference between stewardess and purser salaries was the appropriate measure of backpay if backpay was to be awarded.

[19] The appeal did assert the minor point described in n.18, *supra* —a contention again resolved against NWA (App. 101a-102a, n.153)—but did not challenge the use of the stewardess-purser differential as the measure of backpay.

to which NWA refers at pages 7-8 and 17 of its Petition (see App. 31a). The district court refused even to entertain NWA's quest for a revised backpay formula, holding that NWA had waived its claim by not asserting it years earlier (App. 241a). It is that waiver holding which was affirmed in *Laffey III*. NWA has thus waived its right to raise the issue it seeks to present to this court.[20]

---

[20] Even if NWA's belated contention had not be held waived, NWA's second question presented would be frivolous, for two reasons:

(a) The only evidentiary foundation for NWA's contention is the affidavit that NWA proffered in 1978. The affiant speculated that had NWA not maintained a dual salary scale following enactment of the Equal Pay Act in 1963, but instead raised the women's salary to the men's (as that Act required), NWA thereafter would have insisted in collective bargaining that salaries be frozen at that level rather than continuing to raise them as in fact it agreed to do; and, the speculation continued, NWA would have prevailed in those negotiations, so that the (hypothesized) equalized rate would not have risen to the levels that the men's rate actually reached. The affiant first came to NWA years after the period to which his speculation related, and thus the affidavit was nothing more than post-hoc conjecture by a person who was not even competent to testify about the pertinent period. Moreover, as NWA had itself declared (in its brief three years before in *Laffey I*), such post-hoc conjecture is so speculative as to be unworthy of credence:

> [I]t is nonsense to assume a contract which was never negotiated. We are not dealing with any specific pay rate, *e.g.*, a minimum wage. A variable collectively-bargained rate is at stake. It is wholly speculative as to what rates would be now if an equal cabin attendant rate had been established at the 1965 Purser level. Lacking evidentiary and logical suport, such speculation is improper. [Appellant's Combined Reply Brief and Brief on Cross-Appeal in Nos. 74-1791 and 75-1334 (*Laffey I*), p. 43.]

What NWA declared in its 1975 brief to be "nonsense," "wholly speculative," and "improper," is what NWA tendered to the district court by affidavit in 1978 and urged as the evidentiary basis for its quest for a change in the backpay formula. (Plaintiffs did not "rebut" the affidavit (Pet. 17) because there was no need to. Plaintiffs advised the court that they would introduce rebuttal

III.

A. NWA's third question presented—the meaning of the term "willful" in 29 U.S.C. § 255(a)—does not merit the Court's attention in this case. NWA is correct that the court below employed a different verbal formulation in defining the test of willfulness than that employed by other Circuits.[21] But that cannot avail NWA. For what

---

evidence if NWA's quest were not summarily rejected as untimely, but of course it *was* summarily rejected as untimely.)

(b) This case would not in any event present the issue stated in NWA's second question—whether the courts are "required" to award Title VII backpay in the amount of the difference between men's and women's rates—because the district court never suggested that it was "required" to use that formula. It adopted that formula because both sides had embraced the concept that any backpay should be measured by the difference between purser and stewardess salaries (see pp. 20-21, *supra*). The question that would be posed (were it not waived) would be whether it was an *abuse of discretion* for the district court to adopt a formula that both sides embraced. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 412 (1975). Moreover, even had NWA timely objected to the formula proposed by plaintiffs and proffered a substantial evidentiary basis for its objection, it would not have been an abuse of discretion for the district court to adopt that formula. NWA *concedes* that that formula is *required* for those plaintiffs recovering under the Equal Pay Act (Pet. 16, 18). NWA's contention thus reduces to the unlikely proposition that it is an abuse of discretion for a court to provide the same remedy that Congress required under the Equal Pay Act when the identical violation is being remedied under Title VII. As the court below explained in *dictum* in *Laffey III* (App. 31a-32a), NWA derives no support for that proposition from this Court's analysis in *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702 (1978).

[21] The court below held that an "employer's noncompliance is 'willful' when he is cognizant of an appreciable possibility that he may be subject to the statutory requirements and [either] fails to take steps reasonably calculated to resolve the doubt [or] . . . consciously and voluntarily charts a course which turns out to be wrong." App. 122a-123a (footnotes omitted).

Prior to *Laffey*, the accepted formula was that established by the Fifth Circuit in *Coleman v. Jiffy June Farms, Inc.*, 458 F.2d 1139, 1142 (5th Cir. 1971), *cert. denied*, 409 U.S. 948 (1972), and *Brennan v. Heard*, 491 F.2d 1, 3 (5th Cir. 1974). That formula

NWA ignores is that the formulation adopted by the court below *is more favorable to defendants* than that employed by the other Circuits (see n.21, *supra*), as the court below correctly observed (App. 121a-122a), and the court below found NWA's violations willful under that more rigorous standard. Indeed, the court below observed that NWA's violations would be willful even under the well-established standard governing willfulness in the FLSA's *criminal provision* (App. 122a, n.230).

NWA thus could overturn the decision below only by establishing that *all* of the appellate decisions defining "willful" in § 255(a) were wrongly decided. And that is, indeed, NWA's quest. The common denominator of all the appellate decisions—regardless of their precise verbal formulations—is that a violation is willful if the employer deliberately took action that is forbidden by the statute and did so with cognizance of an appreciable possibility that the affected employees enjoyed the statute's protection. See n.21, *supra*, and n.24, *infra*. All of the appellate decisions reject the notion that "willful" for purposes of

---

considers an employer's action "willful" when the employer knew or should have known that his conduct was governed by the FLSA. "Stated most simply, we think the test should be: Did the employer know the FLSA was in the picture?" *Jiffy June*, 458 F.2d at 1142.

Other than the court below, every Court of Appeals to consider the issue has adopted the Fifth Circuit standard. *Donovan v. Simmons Petroleum Corp.*, 725 F.2d 83, 85 (10th Cir. 1983); *Donovan v. Carls Drug Co.*, 703 F.2d 650, 652 (2nd Cir. 1983); *Marshall v. Erin Food Services, Inc.*, 672 F.2d 229, 231 (1st Cir. 1982); *Marshall v. Root's Restaurant, Inc.*, 667 F.2d 559, 560-61 (6th Cir.), *cert. denied*, 459 U.S. 825 (1982); *Marshall v. Union Pacific Motor Freight Co.*, 650 F.2d 1085, 1091-93 (9th Cir. 1981).

The court below (App. 116a) cited one district court decision requiring "that violations of the Act must be deliberate, voluntary and intentional" in order to be "wilfull." *Brennan v. Westinghouse Credit Corp.*, 21 Wage & Hour Cas. 871, 875-76 (E.D. Tenn. 1973). No court of appeals has adopted that standard; and the *Westinghouse* decision cannot be considered to have survived the Sixth Circuit's contrary decision in *Marshall v. Root's Restaurant, Inc.*, *supra*. NWA's effort (Pet. 19) to portray this district court decision as if it were a "circuit[]" decision is disingenuous.

§ 255(a) requires an iniquitous state of mind; all hold that a violation will be willful even though the employer neither believes that its conduct is violative of the Act nor acts with bad faith or ill-will.[22] NWA invites this Court to discard this well-established concord and hold that moral culpability is required (Pet. 22). Two panels of the court below gave NWA's contention painstaking consideration, scrutinized the pertinent legislative materials, and found NWA's contention wanting (App. 117a-123a (*Laffey I*); App. 25a-29a (*Laffey III*)). And NWA proffers nothing to suggest why, in the face of an unbroken line of appellate decisions rejecting it, NWA's contention should occupy this Court's attention.

B. NWA seeks to infuse its "willful" question with a significance it does not possess, by tying it to the issue pending before this Court in *Trans World Airlines, Inc. v. Thurston*, No. 83-997, respecting the definition of "willful" as it appears in Section 7(b) of the Age Discrimination in Employment Act, 29 U.S.C. § 626(b). NWA's attempt to piggy-back on *Thurston* is specious.

"Willful, as we have said, is a word of many meanings, its construction being influenced by its context." *Spies v. United States*, 317 U.S. 492, 497 (1943). The ADEA provision is in a different statute, enacted by a different Congress, and serves a different purpose, from § 255(a). The ADEA provision determines not whether a victim of an ADEA violation will recover lost wages, but whether such a victim will recover an equal additional amount as liquidated damages. In contrast, § 255(a) determines whether an FLSA victim will be compensated *at all* for a year during which wages were wrongfully withheld (or whether, conversely, the employer will retain the wages

---

[22] *See, e.g., Donovan v. Simmons Petroleum Corp., supra*; *Castillo v. Givens*, 704 F.2d 181, 193 (5th Cir.), *cert. denied*, —— U.S. ——, 104 S. Ct. 160 (1983); *Donovan v. Carls Drug Co., supra*; *Marshall v. Erwin Food Services, Inc., supra*; *Marshall v. Root's Restaurant, Inc., supra*; *Marshall v. Union Pacific Motor Freight Co., supra.*

wrongfully withheld). The fact that § 255(a) determines the availability of compensatory ("make whole") relief—and is in no sense a punitive provision—was deemed "especially important" by the court below in concluding that "willful" in § 255(a) does not require moral culpability (App. 28a). Those who are arguing for a moral culpability standard for willfulness under the ADEA rely heavily upon what they claim is evidence in the legislative record that Congress intended liquidated damages under the ADEA to be a punitive sanction.[23] Whether or not that reading of the ADEA legislative history is correct, and whether or not it carries the day in *Thurston*, it has no conceivable implication for the meaning of "willful" in § 255(a).

No party in *Thurston* has suggested that willful *as used in § 255(a) of the FLSA* requires moral culpability.[24] Indeed, the only reference to § 255(a) in the *Thurston* briefs is the request of the EEOC that this court construe the term "willful" in the ADEA provision similarly to the well-established definition of the term as it appears in § 255(a).[25] Whatever the merit of *that* position, it is a contention of an entirely different order to suggest (as NWA does) that a decision by this Court holding, on the

---

[23] Brief of Trans World Airlines, Inc., in *Thurston*, pp. 34-35; Brief Amicus Curiae of the Chamber of Commerce of the United States, *id.*, p. 8; Brief Amicus Curiae of the Equal Employment Advisory Council, *id.*, pp. 10-11.

[24] The Solicitor General advised this Court in *Thurston* that in construing § 255(a) "the courts have unanimously rejected any specific intent requirement," EEOC Br. 33, n.38, and that "[t]he courts of appeals uniformly have held that Congress used the term 'willful violations' in [§ 255(a)] to describe situations in which the employer took actions in fact prohibited by the statute and was, or should have been, cognizant of an appreciable possibility that the employees involved were covered by the statutory provisions," *id.* at 32.

[25] EEOC Br. 32-33.

basis of the particular legislation history of the ADEA, that the ADEA provision requires moral culpability would provide the basis for rolling back the unbroken interpretation of the earlier-enacted § 255(a).

Moreover, even if NWA were to prevail in securing a remand for redetermination pursuant to such a standard, it is inconceivable that NWA could escape a finding of willful given the statements already made by the courts below as to NWA's animus (see pp. 11-13 *supra*). There will be ample opportunities for this Court to decide the meaning of "willful" as used in the FLSA, should the Court think that issue worth reviewing, in future cases where, unlike here, a change in definition might ultimately be outcome determinative. As the court below observed, a definitive resolution of the precise locus of the line that divides willful from non-willful violations under § 255(a) can await "cases closer than the one at bar" (App. 122a). And, as well, it can await a case in which discriminatees have not already waited 17 years to be made whole for the injuries they have suffered.

IV.

NWA's fourth question—which involves the standards governing liquidated damages in actions governed by the FLSA—is not presented by the decision below, for the court below did not hold, as NWA asserts, that the considerations advanced by NWA were "completely irrelevant as a matter of law" to the liquidated damages determination (Pet. i, Par. 4).[26]

Under the FLSA, liquidated damages are mandatory unless the employer carries its burden of proving *both*

---

[26] For good reason, NWA does not attempt to tie *this* question to the issue of liquidated damages pending in *Thurston*. In enacting the ADEA, Congress "altered the circumstances under which [liquidated damages] would be available in ADEA actions" from those applicable under the FLSA. *Lorillard v. Pons*, 434 U.S. 575, 581, n.8 (1978).

that "he had reasonable grounds for believing that his act or omission was not a violation" *and* that his "act or omission . . . was in good faith," 29 U.S.C. § 260. Court of Appeals decisions over four decades have unfailingly held that the two standards are separate, the first requiring an objective inquiry and the second a subjective inquiry, and that an employer can escape liquidated damages only by prevailing on both.[27]

In this case, the district court found that NWA failed to prove *either* of the prerequisites to escaping liquidated damages (App. 250a-256a), and the court below, in *Laffey III*, affirmed the district court as to both (App. 46a-52a). Since failure to prevail on *either* ground would be fatal to NWA's effort to escape liquidated damages, the question NWA seeks to present—whether an employer's "traditional practice," "industry practice," union "acquiescence," and employee quiescence are relevant considerations under § 260—could be outcome determinative in this case (and thus properly presented here) only if the court below had declared those considerations irrelevant to *both* of the standards established by § 260.

The court below did not do so. It held only that the four considerations are irrelevant to the "reasonable grounds" standard. The court in *Laffey I* explained that the "reasonable grounds" standard—the "objective" criterion—turns on whether there actually exist "ambiguous or complex legal requirements" or "legal uncertainty," such that a well-motivated employer *could* arrive at a "good faith but erroneous belief that he is in conformity with the Act" (App. 131a-132a). And the factors cited

---

[27] *See e.g., Sinclair v. Automobile Club of Oklahoma, Inc.*, 733 F.2d 726, 730 (10th Cir. 1984), and cases cited therein; *Burnley v. Short*, 730 F.2d 136, 139-40 (4th Cir. 1984), and cases cited therein; *Marshall v. Brunner*, 668 F.2d 748, 753 (3d Cir. 1982), and cases cited therein; *Beebe v. United States*, 640 F.2d 1283, 1295 (Ct. Cl. 1981); *McClanahan v. Matthews*, 440 F.2d 320, 322-23 (6th Cir. 1971); *Wright v. Carrig*, 275 F.2d 448 (4th Cir. 1960); *Rothman v. Publicker Indus., Inc.*, 201 F.2d 618, 620 (3d Cir. 1953).

by NWA were held not relevant to *that* inquiry (App. 130a):

> That an employer and others in the industry have broken the law for a long time without complaints from the employees is plainly not *the reasonable ground* to which the statute speaks. [Emphasis added].

But the court below did not hold that the factors cited by NWA were irrelevant to the "subjective" criterion in § 260, the "good faith" standard. Indeed, the court in *Laffey III* reiterated that these factors were held irrelevant only to the "reasonable grounds" standard (App. 49a), and NWA's own brief to the Court of Appeals in *Laffey III* recognized that the Court in *Laffey I* had held these factors irrelevant only to "reasonable grounds."[28] Rather, the court below held that these factors did not establish NWA's "good faith" in the particular circumstances of this case, when evaluated in the context of the whole record, for there was an abundance of additional evidence that showed NWA had not acted in good faith.[29]

---

[28] Brief of Northwest Airlines, Inc. in *Laffey III*, at 72, n.*.

[29] The court below defined the test of "good faith" under § 260 as whether the employer had "an honest intention to ascertain what the [Equal Pay] Act requires and to act in accordance with it" (App. 47a, 127a). NWA does not challenge that standard, which has been applied by the courts for over 30 years. See *Addison v. Huron Stevedoring Corp.*, 204 F.2d 88, 93 (2d Cir.), *cert. denied*, 346 U.S. 877 (1953). In affirming the district court's finding that NWA had not shown "good faith" as thus defined, the court below noted that the evidentiary weight that might otherwise be warranted by the factors cited by NWA was substantially reduced in the circumstances of this case, for "the prevalence of sex-discrimination litigation against the airline industry" would have alerted a well-intentioned employer that it could not trust "its own tradition, the industry custom nor the employees' silence [to be] a reliable indicium of the demands of the law" (App. 48a). (NWA's own prior sex-discrimination litigation experiences are described at App. 185a-187a). Beyond that, the court below affirmed the district court's reliance on a host of *other* evidence that showed that NWA had not had an "honest intention" either to "ascertain what the Act requires" or "to act in accordance with

Because the court below did *not* rule the factors cited by NWA to be irrelevant to the "good faith" determination, because NWA does not challenge that determination on any other ground, and because that determination alone establishes that NWA was required to pay liquidated damages, NWA's fourth question simply is not presented in this case.[30]

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

MICHAEL H. GOTTESMAN
(Counsel of Record)
ROBERT M. WEINBERG
JULIA PENNY CLARK
BREDHOFF & KAISER
1000 Connecticut Ave., N.W.
Washington, D.C. 20036
Attorneys for Respondents

---

it": the negligible (virtually non-existent) effort made by NWA following passage of the Equal Pay Act to assess the Act's impact upon NWA's dual salary scale (App. 49a-50a, n.40); NWA's substantial delays in curing other sex-discrimination violations even after it knew they were unlawful (App. 51a); and NWA's persistence in the equal pay violation for six years after suit was brought (when none of the factors cited by NWA any longer pertained)—indeed for two years after the district court declared the salary differential unlawful (App. 51a & n.42).

[30] In any event, NWA's attempted reliance on the declaration of policy in 29 U.S.C. § 251 (Pet. 24-25) is misplaced. That declaration explained *not* the reasons for enacting § 260, but the reasons for enacting 29 U.S.C. § 252: the "purpose" articulated in § 251 was "fulfilled by the enactment of Section 2 [§ 252]." *Steiner v. Mitchell*, 350 U.S. 247, 253 (1956). See also *Battaglia v. General Motors Corp.* 169 F.2d 254, 258 (2nd Cir. 1948); *Addison, supra*, 204 F.2d at 96 (L. Hand., Jr., concurring). The legislative materials make clear that entirely different considerations prompted Congress to enact § 260. *See* App. 128a-129; H. Rep. No. 71, 80th Cong., 1st Sess., 3, 7-8 (1947).